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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 39.

BROOKLYN EASTERN DISTRICT TERMINAL,

Petitioner,

—against—

THE UNITED STATES OF AMERICA,

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

OSCAR R. HOUSTON,
LEONARD J. MATTESON,
Counsel for Petitioner.

INDEX.

PAGE

Opinions Below 1

Jurisdiction of This Court 1

Statement 2

Question Presented 3

Facts 3

POINT I—The Circuit of Appeals erred in reversing the decisions of the District Court and the Special Commissioner and disallowing libellant's claim for damages for loss of use of the tug "Integrity" during the period of repairs, although the libellant was obliged to replace the services of the "Integrity" and furnished as a substitute the services of two of its other tugboats operated extra hours overtime, the equivalent of the services of a spare tugboat, on the ground that the libellant had not shown that it had specifically declared its policy of keeping three tugboats in commission instead of two for the purpose of maintaining spare tugboat capacity for emergencies 6

CONCLUSION 14

TABLE OF CASES CITED:

PAGE

Cayuga, The, 7 Blatchf. 385, 5 Fed. Cases 329, 331, No. 2537; aff'd 14 Wall. 270.....4, 7, 8, 9, 10, 13, 14

Conqueror, The, 166 U. S. 110.....13, 14

Emma Kate Ross, The, 50 Fed. 845 (C. C. A. 3)....5, 9, 10

Favorita, The, 8 Blatchf. 539, 8 Fed. Cases 1099, No. 4695; aff'd 18 Wall. 598, 603.....4, 8, 9, 13

Glendola, 47 F. (2d) 206 (C. C. A. 2)..... 13

Mediana, The, 1900 A. C. 113 (House of Lords)..... 11

New Haven Steamboat Co. v. *New York,* 36 Fed. 716 (S. D. N. Y.) 5, 8

Newtown Creek Towing Co. v. *New York,* 23 F. (2d) 486 (C. C. A. 2)..... 12

Potomac, The, 105 U. S. 630, 631..... 14

Priscilla, The, 55 Fed. (2d) 32 (C. C. A. 1)..... 10

Providence, The, 98 Fed. 133 (C. C. A. 1).....5, 10

State of California, The, 54 Fed. 404 (C. C. A. 9).... 11

STATUTES CITED:

Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347)..... 2

Article 3, Section 2, Clause 1, Constitution of the United States 2

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Opinions Below.

The opinion of the Circuit Court of Appeals appears in the record at page 78 and is reported 54 F. (2d) 978. The opinion of the District Court appears in the record at page 72 and is not officially reported, but is reported in full, 1931 A. M. C. 345-47. The report of the Special Commissioner appointed to assess damages appears in the record at page 67 and is not officially reported, but is reported in part, 1931 A. M. C. 342-44.

Jurisdiction of This Court.

A petition for a writ of certiorari was filed April 15, 1932 (R. 85) and was granted by order of this Court entered May 23, 1932 (R. 82).

The jurisdiction of this Court is under Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347), and under Article 3, Section 2, Clause 1, Constitution of the United States.

Statement.

By this writ the petitioner seeks to review the decree of the United States Circuit Court of Appeals for the Second Circuit made January 18, 1932 (R. 81-2), modifying the decree of the United States District Court for the Southern District of New York, in admiralty entered September 26, 1930 (R. 75-6), on the opinion of the Honorable Francis G. Caffey, District Judge (R. 72-4), approving the findings of the Special Commissioner, George V. A. McCloskey, Esq., appointed by the District Court to assess damages (R. 67-70).

In particular, petitioner seeks to review that part of the decision of the Circuit Court of Appeals reversing the decisions of the District Court and of the Commissioner appointed to assess damages, allowing the libellant's claim for damages for loss of use of the steamtug "Integrity" during the period of repairs required as a result of collision with the United States Dredge "Raritan" in New York Harbor, September 30, 1920.

This action was instituted by the libellant as the owner of the tug "Integrity" under Private Law 163, approved February 16, 1925, authorizing suit against the United States. A cross-libel was filed by the United States for damage to the dredge "Raritan". The District Court after a trial on the merits held that the collision resulted from the fault of both vessels and awarded the libellant a recovery of half its damages less half the damages sustained by the dredge "Raritan".

Question Presented.

A single question is presented to be reviewed by this Court.

Did the Circuit Court of Appeals, reversing the District Court and the Special Commissioner, properly disallow libellant's claim for loss of use of the tug "Integrity" during the period of repairs on the ground that her services were replaced by the services of two other tugs owned by the libellant working extra hours overtime and not by an "outside" tug hired for the purpose?

Facts.

This libel was filed and the opinion of the District Court was rendered before Admiralty Rule 46½ (281 U. S. 773) became effective. However, although the opinions of the lower courts are not in the form of specific findings of fact, the facts are not in dispute.

The facts are that the libellant had three tugs which were ordinarily employed ten hours per day each. The libellant's business was such that it had regular and continuous employment for all three tugs for the full period each day. While the tug "Integrity" was laid up for repairs consequent on the collision in this case, the work which it ordinarily performed was performed by the other two tugs operating the necessary number of extra hours overtime each day (Kilpatrick, R. 27-30). The libellant, therefore, furnished as a substitute for the "Integrity" the equivalent of the services of another tugboat operating ten hours a day out of its spare tugboat capacity. There is no question about these facts. They were found by the District Court (R. 73) and the Special Commissioner (R. 70) and these findings have not been disturbed by the Circuit Court of Appeals.

On these facts the Commissioner allowed libellant compensation for the loss of use of the tug "Integrity" at "the going market rate" (R. 70). The District Court confirmed this award as "the reasonable value during the period of detention, of the extra use by the libellant of its own tugs for time equivalent to that during which it would have employed the 'Integrity' if uninjured, or what would have been the cost to it of hiring a substitute tug (*The Cayuga*, 5 Fed. Cases 329, 331, No. 2537; aff'd 14 Wall 270)" (R. 73).

On the appeal the United States did not object to the amount fixed either as the reasonable value of the hire of a substitute, or of the services of the "Integrity" which were lost, but contested the allowance of any damages whatever to the libellant for loss of use (R. 79, 77). The Circuit Court of Appeals disallowed the claim for loss of use in its entirety (R. 80).

The libellant's contention is that it furnished as a substitute for the "Integrity" the equivalent of a spare tugboat maintained for such an emergency. Libellant's requirements for tugboat services were ordinarily met by the services of three tugboats working daily shifts of ten hours each. This service could as well have been performed by two tugboats working the required extra shifts each day. If the libellant had arranged its business in this manner and had maintained the third tugboat as a "spare" and had used the third tugboat as a substitute in the emergency brought about by this collision there is no doubt under the decisions of this Court and of the lower courts that it would have been entitled to recover the reasonable hire of a tugboat of similar capacity as the proper measure of damages for loss of use of the vessel injured.

The Cayuga, 7 Blatch. 385, affd. 14 Wall. 270;
The Favorita, 18 Wall. 598, 603;

The Providence, 98 Fed. 133 (C. C. A. 1);
New Haven Steamboat Co. v. *New York,* 36 Fed. 716 (S. D. N. Y.);
The Emma Kate Ross, 50 Fed. 845 (C. C. A. 3).

The Circuit Court of Appeals, admitting this, nevertheless refused to allow the libellant damages for loss of use on the ground that it did not appear definitely in the record that the libellant had specifically arranged its business as it did "for that reason", that is for the purpose of maintaining sufficient spare tugboat capacity to serve in an emergency. The Circuit Court of Appeals said:

> "In particular, the argument is that since each tug, as ordinarily operated, was free for part of the 24 hours, the spare time was the equivalent of a 'spare tug', maintained only for a lay-off. *Perhaps this might be sound, if it appeared that three tugs were kept in commission instead of two for that reason; but it does not.* So far as the record shows, there was business enough for all operated for as much of each day as libellant thought reasonable. *Certainly we have no ground for saying that it was to constitute a reserve that they were not operated overtime; nothing else will serve*" (R. 79-80). (Italics ours.)

We submit that the fact that the libellant did not hold a directors' meeting and adopt a resolution specifically declaring its reasons for arranging its operating schedule as it did is not a sufficient basis for denying to the libellant damages for loss of use of the tug "Integrity" under the circumstances of this case and that the decision is wrong and in conflict with the authorities hereinafter cited.

POINT I.

The Circuit Court of Appeals erred in reversing the decisions of the District Court and the Special Commissioner and disallowing libellant's claim for damages for loss of use of the tug "Integrity" during the period of repairs, although the libellant was obliged to replace the services of the "Integrity" and furnished as a substitute the services of two of its other tugboats operated extra hours overtime, the equivalent of the services of a spare tugboat, on the ground that the libellant had not shown that it had specifically declared its policy of keeping three tugboats in commission instead of two for the purpose of maintaining spare tugboat capacity for emergencies.

Even the Circuit Court of Appeals virtually concedes that the libellant would be entitled to damages for loss of use of the tug "Integrity" under the doctrine of the spare boat cases if it had been shown that it had definitely formulated and declared in advance its policy of operating its three vessels ten hours per day for the purpose of having spare boat capacity available in the event of an emergency (R. 80). The Circuit Court of Appeals itself was the first to suggest the necessity for any such showing. We submit that this is not a sufficient basis for distinguishing this case from the decisions of this Court and the Circuit Courts of Appeal in other circuits which have been cited, and that no such distinction is warranted by the principles laid down in those decisions. It would be strange indeed if the mere fact that the libellant had failed to formulate definitely and declare a policy of maintaining three tugboats in operation, instead of two tugboats and a spare, for the purpose of maintaining spare tugboat capacity in case of an accident disabling one of the tugs, should be allowed to make

the difference between the libellant's recovering damages for loss of use from the tort feasor and recovering nothing.

No difference in principle can be noted whether the libellant maintained two tugboats and a spare, or three tugboats working lesser hours. The libellant's investment, overhead and depreciation would be identical in either case. The suggestion that the libellant had no expense of this character in this case is without merit. It was merely a matter of convenience which plan of operation was adopted. The case is therefore squarely in conflict with the "spare boat" decisions by this Court and in other circuits as well as the earlier decisions in the Second Circuit.

The leading case is *The Cayuga*, 7 Blatch. 385 (C. C. N. Y.), Fed. Cas. No. 2537, affirmed by this Court with specific approval of the opinion, 81 U. S. (14 Wall.) 270. In that case a ferryboat was damaged and replaced by another ferryboat owned by the libellant and kept available for use when an accident or other cause should disable one of the boats in daily use. It was contended there, as here, that the libellant had suffered no loss and was not entitled to any recovery. The libellant, however, by experts, proved the reasonable value of the use of the damaged vessel and a recovery was allowed to the libellant on this basis. In his opinion Circuit Justice Woodruff said:

> "If it be conceded that a just allowance for the necessary cost of another boat, hired at its fair value to perform the service, would be necessary to the indemnity of the libellants, there is no sound reason, I think for withholding such allowance when the libellants furnish the substituted boat themselves. * * * In the case of the *Rhode Island* (Case No. 11,744) an allowance of a sum which would have enabled the libellant to supply the place of an injured vessel, was affirmed by Mr. Justice Nelson although, in fact, the place of the injured vessel was

not supplied at all. The principle of indemnity is uniformly recognized as just, and its measure must be the same, whether a substitute is furnished by the libellant or procured from another. * * * To withhold compensation is, to my mind, obvious injustice. Where the proof of what such a boat could have been let for upon hire or charter is practicable, as in the cases relied upon by the claimants, that is a just measure. The whole subject has been much debated, and no rule which is adapted to every supposable case can be deemed established. It is not true that the use of this boat has, in fact or in law, no value. The testimony of witnesses conversant with the subject, and of long experience, proves the contrary."

This opinion received the full approval of this Court, 81 U. S. (14 Wall.) 270, 278.

The Favorita, 8 Blatch. 539, Fed. Cas. No. 4695, affirmed 85 U. S. (18 Wall.) 598, 603-604, was based on similar facts and followed the decisions in *The Cayuga*.

The doctrine of these cases has nowhere been better stated than by Judge Brown in the case of *The New Haven Steamboat Co.* v. *The Mayor, etc.*, 36 Fed. 716, 718 (S. D. N. Y.):

"The owners were entitled to procure another boat to take the place of the 'Continental', while she was disabled through the collision. It is immaterial to the respondents whether the substitute was hired from other persons at market rates, or supplied by the libellants themselves. If the latter chose, as a matter of policy, to be at the expense of maintaining a 'spare boat' for emergencies, the liability to accidents like the present was one of the causes and inducements to this outlay, as the evidence of the superintendent shows. They are entitled, therefore, to charge for the use of their own boat at the market

> value of its use, for the time being, precisely as if they had hired her from other owners."

This case involved damage to an excursion boat, which was replaced by a "sister boat" kept by the libellants——

> "for the purpose, *in part*, as appears from the evidence, of continuing the trips of the line with regularity, in case of accident to one of the regular boats, or during their repair. She was also occasionally let out for excursions, and upon special charters" (p. 717). (Italics ours.)

Note that the sister boat was maintained only "in part" as a spare and was partially employed at other times on special charters,—just as the two sister boats of the "Integrity" were employed at less than their full capacity.

The Circuit Court of Appeals for the Third Circuit adopted and applied the spare boat doctrine in the case of *The Emma Kate Ross*, 50 Fed. 845. In that case an excursion vessel was damaged and her use lost for a period during which she was replaced part of the time by a vessel hired by her owners and for the balance of the period by the substitution of another vessel of the same owners. The Court allowed the libellant the value of the substitute which it measured by the cost of hiring an outside vessel for the entire period. In deciding the case the Court cited *The Cayuga* and *The Favorita* and said:

> "Notwithstanding the decision, the respondents here, again present the question, contending for the same reason, that the libellants should receive nothing for the 12 days during which their own vessel was substituted. Whatever we might think of this question if it was open, we are bound by the decision. It is not, however, improper to say that we think the decision is right. The libellants were entitled to the market value of the services rendered by their sub-

stitutes,—regardless of the fact that they might otherwise have been idle. The vessels represented a large investment made in preparation for contingencies which might require their services. Why then should the respondents have their use without paying for it? As the court said in *The Cayuga,* 7 Blatch. 390:

> 'There is neither justice nor equity in allowing a tort feasor the benefit of this outlay, gratuitously. Conceding that a just allowance for the necessary cost of another vessel, hired at a fair value, to perform the services is necessary to indemnify the libellants, there is no ground for withholding such allowance when the libellants themselves furnish the substitute'" (pp. 847, 848).

The Circuit Court of Appeals for the First Circuit adopted and applied the doctrine of *The Cayuga* in the case of *The Providence,* 98 F. 133 (C. C. A. 1). In that case the court said:

> "Another proposition submitted to us is met by *The Cayuga,* and that is the fact that the owners of 'The Providence' kept another boat for winter service, with which they immediately replaced 'The Providence' for the balance of her season. In this respect, the case at bar follows *The Cayuga,* where the fact that her owners substituted another ferryboat, which they kept for emergencies, did not defeat the allowance of demurrage, estimated in the way which we have explained. This rule was expressly approved in *The Favorita,* 18 Wall. 598, 603, and apparently approved in *The Conqueror,* at pages 128, 129, 166 U. S., and page 517, 17 Sup. Ct." (p. 136).

The same court approved the rule in *The Emma Kate Ross, supra,* and again applied the doctrine of *The Cayuga* in the case of *The Priscilla,* 55 F. (2d) 32. In that case the court allowed the libellant the market value of the use of one of its barges ordinarily in service in the port of New York,

which was towed to Boston and there used to replace the damaged vessel owned by the same owners.

The Circuit Court of Appeals for the Ninth Circuit applied the same rule in *The State of California*, 54 Fed. 404. The Court there awarded the libellant "a fair estimate of the value of her use during the time of her detention" (p. 407), although a sister ship had been substituted, and said:

> "The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency. Upon consideration of the evidence, we are satisfied that the amount allowed for demurrage is reasonable."

The English courts have adopted the same rule—*The Mediana*, 1900 A. C. 113 (House of Lords).

The decision of the Circuit Court of Appeals cannot be justified on the theory that the substituted vessels would have been idle during the period of substitution and that for this reason damages must be limited to the extra expense of operating the substituted vessel. To deny compensation at market rates on this basis is directly in conflict with the doctrine of the spare boat cases, which we have cited, which proceed on the assumption that the substituted vessel would have been idle.

Moreover, such a theory is unsound in principle. If the owner of vessels A and B can recover market rates for the use of A when substituted for B, only if A would have been employed at market rates in any event, it is evident that the owner in such case is still uncompensated for the

loss of use of one of his vessels as he would have received market rates for the use of vessel A if there had been no collision. He would then be receiving from the tort feasor for the use of vessel A only what he would otherwise have received from some one else and he is still uncompensated for the loss of use of B (or the loss of the business A would otherwise have done).

To view the matter from another angle, suppose several vessel owners have vessels which are not in use and are available as substitutes, but the owner of the injured vessel has none. Undoubtedly the injury to vessel B makes employment available for some vessel which otherwise would have had none. Any one of the other vessel owners can of course supply his vessel as a substitute and receive the market rate. To deny the same privilege to the owner of vessel B when he owns another vessel of the same type is to discriminate against him as an owner of vessels of the class in question and to penalize him for having two vessels. He alone of the entire class of owners of vessels of the given type is not permitted to obtain for his vessel the employment at market rates made available by the tort from which he has suffered. We submit such a result is not justice and is not in accordance with the equitable principles by which the admiralty courts are guided.

Neither can the decision of the Circuit Court of Appeals be justified on the theory that there would have been no work for the injured vessel (R. 79) for the testimony is uncontradicted that there was work available to occupy the time of the "Integrity" for full working hours each day.

It was on the principle that it must be shown that there was work available for the injured vessel that the Circuit Court of Appeals based its decision in *Newtown Creek Towing Co.* v. *New York,* 23 F. (2d) 486. But that is not this case.

Neither does this case fall within the scope of the decision in the *Glendola,* 47 F. (2d) 206 (C. C. A. 2), relied on by the Government and cited by the Circuit Court of Appeals. In that case the expense of a smaller substituted vessel was allowed but the owner claimed additional damages for the difference in capacity between the substitute and the injured vessel whose services were lost. The libellant, however, failed to prove any additional use of its other vessels or any "embarrassment to its business in general" and, therefore, failed to lay any basis for an additional award. On the contrary in this case it appears definitely that the "Integrity's" sister boats were worked extra hours to the equivalent of the service of an additional tug.

The Conqueror, 166 U. S. 110, cited by the Circuit Court of Appeals, is not an authority for disallowance of the claim. On the contrary that case recognized and approved the validity of the decisions in the spare boat cases, *The Cayuga,* and *The Favorita, supra.* That case held merely that the facts justifying the recovery must be proven with reasonable certainty and that under the circumstances of that case the libellant, the owner of a yacht used only for pleasure, had failed to establish a pecuniary loss.

We submit that the only basis on which the Circuit Court of Appeals distinguishes the spare boat cases, that is,

> "in no event do we think that the doctrine applies when the time lost is made up by boats which are not maintained as spares" (R. 79),

is arbitrary, untenable, unsound and not justified by reason or authority. To say that the right of a party injured by another's tort to recover damages depends upon whether or not he has definitely formulated in his mind a certain plan of operating his vessels, is to set up an impracticable and unjust criterion.

The Circuit Court of Appeals has said in effect that the use of the "Integrity's" sister tugs for extra hours had no value. We submit in the language of Mr. Justice Woodruff in *The Cayuga, supra*:

> "It is not true that the use of this boat (these boats) has in fact or in law, no value."

The damages allowed to the libellant by the District Court were the market value of the use of the "Integrity" during the time of detention, that is, what the libellant would have had to pay if it had hired a similar vessel (R. 28, 70, 73). This rate has not been contested (R. 79, 77). This is the measure of damage established by the rule of this court. In the case of *The Potomac,* 105 U. S. 630, 631, this court said:

> "In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum,* the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered."

And in *The Conqueror,* 166 U. S. 110, 127, this court said:

> "The best evidence of damages suffered by detention is the sum for which vessels of the same size and class can be chartered in the market."

CONCLUSION.

The decision of the Circuit Court of Appeals should be reversed and the decree of the District Court affirmed.

Respectfully submitted,

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